

damages in the following way. The plaintiff was about thirty-six years old at the time of accident, and was employed as a 'Kepala' in the Sungei Gapi Estate for six months prior to the unfortunate incident at a salary of \$190 per month. He was hospitalized for about four months from August 30, 1964 to December 24, 1964 and then continued to receive treatment as an out-patient at the General Hospital, Kuala Lumpur. He could not do any work from August 30, 1964 to March 3, 1965, i.e. the period of total temporary disablement was about six months. As regards special damage, I would allow \$1,140 for actual loss of earnings. The claim of \$35 for dental treatment was admitted. But the claim of \$600 for hospital expenses should not be allowed in view of the plaintiff's admission that he got free treatment at the hospital. In the absence of satisfactory proof, both the claim for loss of a wrist watch and the alleged payment of \$400 for five tubes of blood must be rejected. I would, therefore, assess special damage at \$1,175 based on 100% liability.

As regards general damages, the plaintiff sustained the following injuries:—

- (i) 2" laceration left parietal region.
- (ii) Bleeding from left ear.
- (iii) Haematoma right orbit.
- (iv) One upper incisor missing.
- (v) Abrasion left face.
- (vi) Abrasion left back from shoulder region to chest wall.
- (vii) 1" superficial laceration above pelvis
- (viii) Right femur: fracture shaft.
- (ix) Left wrist: comminuted fracture lower end of ulna and chip fracture ulna styloid.

The main injuries are the fracture of the shaft of the right femur, and the comminuted fracture of the lower end of the ulna and a chip fracture of the lower end of the styloid. According to the evidence of Dr. T. H. Khoo Lim (PW2), when he examined the plaintiff on June 23, 1965, he found the plaintiff was slightly limping. The plaintiff was unable to bend his right knee and, therefore, was unable to squat fully. But now he is normal both as regards limping and squatting. The only residual disability is in respect of the slight protruding of the lower end of the ulna bone, for which his left hand can now carry less weight than before the accident. Having regard to the medical evidence and the nature of the plaintiff's work, damages for loss of future earnings and the disadvantages arising from disablement including loss of amenities are quite nominal. A substantial sum must, however, be given for pain and suffering. Having considered the cases cited by both counsel, particularly the case of *Wan Siew Lum v. Mohd. Ariffin*,⁽³⁾ on the basis of 100% liability, I would assess general damage for all the injuries sustained at \$6,500.

Claim dismissed.

Solicitors: *M. M. Cumarasami & Co.; Xavier & Vadiveloo.*

A SINGER SEWING MACHINE CO. v. JEREMIAH

[O.C.J. (Wan Suleiman J.) April 3, 1972]

[Seremban — Civil Application No. 2 of 1972]

Practice and Procedure — Appeal — Extension of time to file memorandum of appeal — Grounds — Discretion of court — R.S.C. 1957, O. 64 r. 7.

B This was an application by way of notice of motion by the defendants in magistrate's court, Kuala Pilah, Civil Action No. 65 of 1969, for extension of time to file their memorandum of appeal and for an order of stay of execution of the judgment entered against them in favour of the plaintiff in that action.

C **Held:** as both the conduct of the applicant company and their solicitors was wholly reprehensible, and as there was no material in this application, the court would not exercise its discretion in favour of the applicants.

Cases referred to:—

(1) *Lau Cher Hian v. Collector of Land Revenue, Muar* [1971] 1 M.L.J. 96.

(2) *Ratnam v. Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

MOTION.

D *K. L. Rekhraj* for the applicants/appellants.
Leong Tuck Onn for the respondent.

Wan Suleiman J.: This is an application by way of notice of motion by the defendants in magistrate's court, Kuala Pilah Civil Action No. 65 of 1969, for extension of time to file their memorandum of appeal and for an order of stay of execution of the judgment entered against them in favour of the plaintiff in that action.

E The affidavit of Lee Meng Choo, the authorised agent of appellant company shows that the solicitors for the appellant company had on 11th January, 1971 filed a notice of appeal against the decision of the learned magistrate in this action which was pronounced on 9th January, 1971.

F On 17th February, 1972 the notice informing the appellant company that the appeal record was ready, addressed to the solicitors for the appellants was instead delivered by the process server at the appellant company's premises at No. 19, Jalan 52/1, Petaling Jaya.

G It was also alleged that since the notice had been served —

"on an unauthorised person who had no knowledge what the document was and had left it aside under the mistaken belief that it was a copy of the notice addressed to the solicitors . . . that it warranted no action on his part".

H It was then alleged that on the 25th February, 1972 the solicitors spoke by telephone to the magistrate's court, Kuala Pilah, and was informed that the appellant company had indeed been served with the notice. The solicitors for the appellant company on the same day applied in writing to the magistrate, Kuala Pilah, for extension of time and he very rightly intimated to them that the power to grant extension of time did not lie in his court. The application before me was not made until 11th March, 1972.

I Mr. Rekhraj for the appellant company referred me to a Federal Court decision — *Lau Cher Hian v. Collector of Land Revenue, Muar*⁽¹⁾ — a decision which I would with respect say does not apply to the facts of the present application.

Mr. Leong for the respondent drew my attention to a number of authorities cited in *Mallal's* Supreme Court Practice at page 922. These authorities were decided under section 531 of the Civil Procedure Code (Cap. 7). Section 531 of this repealed Code reads as follows:—

"No appeal shall be brought after the expiration of one month from the time when the decision appealed against was pronounced. Provided that a judge of the Supreme Court may, if he considers that special circumstances render an extension just, give leave to appeal within such extended time after the expiration of such one month as he may think fit." — (the underlining is mine).

Since Order 64 Rule 7 does not contain any clause approximating to the clause underlined in section 531, it would perhaps be better for me to decide independently of those authorities.

In *Ratnam v. Cumarasamy & Anor.*⁽²⁾ Lord Guest in delivering the judgment of the Judicial Committee said, at page 229:—

"The Rules of Court must be *prima facie* obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation."

I find that both the conduct of the appellant company and that of their solicitors to be wholly reprehensible and I am satisfied that there is no material in this application on which I can fairly exercise my discretion in favour of the applicants.

Accordingly I made no order on the motion and awarded costs to the respondent.

No order made.

Solicitors: K. L. Rekhray & Co.; Sharikat Kam Woon Wah.

CHUAN KEAT CHAN LTD. & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) May 8, 1972]

[Ipoh — Criminal Appeal No. 67 of 1970]

Road Traffic — Alleged breach of statutory provision — Goods vehicle issued carrier's licence attached with condition to carry an attendant at the rear of the vehicle — Effect of non-compliance — Road Traffic Ordinance, 1958, ss. 119(iv)(e) and 120(2).

Penal Code, s. 109 — Abetment — Omission to do an act — Requisites.

This was an appeal against the decision of the learned magistrate, Kampar (Perak). A 'C' carrier's licence in respect of a goods vehicle was issued to the first appellant by the Road Transport Licensing Board, which licence was issued subject to the provisions of the Road Traffic Ordinance, 1958, and the rules made thereunder, and to the conditions attached to the carrier's licence. Condition No. 6 of the licence reads as follows:

"6. An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic".

The first appellant was charged for failing to comply with condition No. 6, punishable under section 120(2) of the Road Traffic Ordinance, while the second appellant, the driver of the vehicle, was charged with abetting the offence of failing to carry an attendant at the rear of the vehicle, punishable under section 120(2) of the Road Traffic Ordinance, read with section 109 of the Penal Code.

The only evidence led by the prosecution was that on February 18, 1970, the second appellant was stopped by a police officer, who did not find any attendant in the lorry.

Held, allowing the appeal: (1) in order to constitute an offence of abetment by omission, the omission must be an illegal one. In the present case, there is nothing in the Road Traffic Ordinance which casts a duty on the driver of a goods vehicle not to drive the said vehicle without an attendant. The learned magistrate failed to consider what was required of the prosecution to prove a charge under section 109 of the Penal Code;

(2) in the absence of any legislation or rules prescribing the duties of attendants, condition No. 6, in the context in which it appears in the licence, can in no way be said to promote or ensure public interest for the safety and convenience of those who try to overtake the goods vehicles;

(3) there would be an order of acquittal and discharge in favour of both appellants.

Per Sharma J.: "The ability to do a thing is indicative only of the potential and the capability. It does not dictate a duty to transform that capability into the actual performance or action".

Cases referred to:—

(1) *Commissioners of Customs and Excise v. Cure & Deeley Ltd.* [1961] 3 All E.R. 641, 657.

(2) *Dyson v. Attorney-General* [1911] 1 K.B. 410, 424.

MAGISTRATE'S CRIMINAL APPEAL.

Lall Singh Mukher for the appellants.

Haidar bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Sharma J. (delivering oral judgment): A 'C' carrier's licence in respect of motor vehicle BK. 6110 was issued to the first appellant by the Road Transport Licensing Board constituted under section 105 of the Road Traffic Ordinance, 1958. This licence was issued subject to the provisions of the Road Traffic Ordinance, 1958 and rules made thereunder and to the conditions attached to the carrier's licence. Condition No. 6 in the licence reads as follows:—

"6. An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic."

On February 18, 1970, the second appellant was the driver of lorry BK. 6110. P.W.1, Mohamed Yusoff bin Abas, Sgt. 7356 stopped this lorry at the 22nd milestone Ipoh-Kampar Road and did not find any attendant in the lorry. The charge against the first appellant was for failing to comply with condition No. 6 attached to the carrier's licence granted to it which, according to the charge, was punishable under section 120(2) of the Road Traffic Ordinance. The charge against the second appellant was for abetment of an offence of failure to carry an attendant at the rear of the lorry punishable under section 120(2) of the Road Traffic Ordinance read with section 109 of the Penal Code. The only evidence led by the prosecution was that P.W.1 stopped the lorry and did not find any attendant in it and that he took down the particulars of the driver and the owner. The prosecution did not go any further than that.